



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

INTERNATIONAL ARBITRATION

The distinctive features of human progress in the nineteenth century were the advancement of natural science, discovery and invention, the growth of human freedom and political liberty, the unifying and nationalization of races into independent states and the development of the principle and the extension of the practice of international arbitration.

If the experiment of international arbitration had not been made—even in a rudimentary form—in ancient or medieval times, it would have been discovered and tried by force of political conditions and exigencies among modern nations, rapidly growing in wealth, population and power; commercially and politically active and enterprising; brought into intimate relations with one another; each having its own set of interests, its own diplomatic agencies, its own system of jurisprudence, its own tribunals for the determination of public and private controversies. Out of these multifarious relations and experiences would naturally have come suggestions of mediation, of conciliation, and of friendly arbitration.

In its origin and development, arbitration was resorted to rather as an expedient than upon principle; it was a function more or less religious or quasi religious and political in character rather than a judicial proceeding. Gradually, down to the middle of the nineteenth century—and more rapidly during the latter half of the century—it grew into final recognition as a principle of justice and high policy to be invoked and tested between differing states in all controversies not of a vital nature.

Adopted first as a simple expedient, next as a matter of policy and justice, and rarely as a matter of simple justice, it was finally developed into a permanent international institution of judicial justice by the Hague convention of 1899.

Among the institutions of human society, it has been the slowest and longest in maturing, the latest in its formal and permanent establishment. Its foundations have yet been barely laid. Its completion

involves the grandest problems, and will evoke the highest and noblest efforts of the practical statesmanship of the present and the future. The process of development of the original idea into the more complete present conception of arbitration as a principle, by a supreme judicatory of nations, was retarded by prejudice.

First there was the prejudice of the most civilized of the ancient European states that the human race consisted of Greeks and non-Greeks or barbarians, the latter terms importing notions of inferiority and hostile contempt. By later ages these terms were transformed and expanded into others only a little broader—Christians and non-Christians, or heathen—the civilized and the uncivilized, or barbarians.

Less than a half century ago the words “civilized,” “semi-civilized,” and “barbarous” were printed on the maps used in the public schools in the United States. The word “civilized” appeared on the maps of the United States, Great Britain, France, Germany and some other European countries. But certain European and Oriental lands were not favored with this ideographic distinction. Ignorance and the prejudices of ignorance were, as ever, more or less systematically taught as a part of the juvenile learning.

This general idea was carried into and generally practiced in the relations of states. There was no just conception of the civilization of states lying outside of the territorial confines of the Roman Catholic Church, including its Protestant offshoots. There was no conception of arbitration as a principle of justice rigorously applicable to all states as to individuals.

The academic growth of the idea of impartial arbitration between all nations has also been retarded, in some measure, by the much labored question of sanctions. The question, as generally stated, implies that behind international law and arbitration some physical force, some compulsory process to insure the observance of the law and the performance of the award, is vital. This conception of the idea of sanctions is erroneously narrow. But all the while this question has been under discussion and acting as a deterrent to the recourse to arbitration, it has been slowly working out its own solution through the agency of a superior power—the most potential and fearful of all human forces—the force of an enlightened and resourceful public opinion before which the most powerful governments, in presence of a great international injustice, stand in awe.

The growth of the idea has also been retarded by the inveterate practice of withholding from arbitral tribunals their proper judicial character through the appointment by governments of their own nationals, and therefore more or less interested partisans, as arbitrators to hear and decide controversies to which they were parties. This vice in the composition of the tribunal thus appointed, besides its various immediate harmful consequences, has brought arbitration into measurable discredit, has shorn it of its due credit as a judicial process, with the result that although there have been a large number of arbitrations, they have contributed little to the development of a consistent body of principles.

If arbitrating states adopt the rule of selection of completely disinterested arbitrators, competent and disposed to decide causes after the fashion of the higher courts of all civilized states, we may confidently expect the gradual improvement and development of a system of international jurisprudence in the same way as the municipal law has been improved by the higher courts of the United States, Great Britain, Germany and other nations.

The progress of arbitration has also been retarded by the spirit of military conquest, kept alive by the enormous and increasing numbers of the professional classes in the art of war; and by the distrust of arbitral tribunals; and by the positive unwillingness of ruling statesmen to forego opportunities to increase the territory and power of their own country.

How is it possible to deal with the practical problems of international arbitration, having as its object the preservation or restoration of peace, on the pure principles of abstract justice, without laying the spectre of military armaments which

With head uplift above the wave and eyes
That sparkling blaze,

menaces the peace of nations?

In essence, the real but non-ostensible intent and end of the overgrown armaments of today is absolutely the same as it was in the ages of Philip, of the Cæsars, of Louis XIV. and Napoleon. The real object was then, thinly disguised, to make war; the declared object now is to prevent war. The plans, the preparations, the tendencies, the results "are very similar, as things not admitting of nice distinction in language."

In modern, in medieval and even in ancient times a sovereign never made war except in spite of himself, and only after he had exhausted all efforts to avoid it.

The story familiar to every school boy of the professions of peace by the embassy of the Roman Senate to Carthage, of Caesar and Pompey, of Napoleon and Metternich, of Napoleon III. and Bismarck, of Russia and Japan in 1903, can, in the light of events, leave no doubt of the actual significance of excessive military armaments.

Had it not been for her vast military armaments, Russia would doubtless have composed her differences with Japan in 1903. Her mighty armaments led her directly to the abyss into which Russia has fallen.

In the light of events, the circular letter of the Russian minister of foreign affairs, of January 11, 1899, has today a sorrowfully prophetic accent:

In proportion as the armaments of each power increase, so do they less and less fulfil the object which the governments have set before themselves. The economic crisis, due in great part to the system of armaments, *a l'outrance*, and the continual danger which lies in this massing of war material, are transforming the armed peace of our days into a crushing burden which the people have more and more difficulty in bearing. It appears evident, then, that if this state of things were prolonged, it would inevitably lead to the very cataclysm which it is desired to avert.

It came and by that route.

The overgrowth of the modern military system is but a revival of similar phenomena witnessed in the past, the prelude to colossal conflicts and disasters from the age of Alexander, of Hannibal and the Scipios to Waterloo and Mukden.

"The maintenance of general peace," said the Czar in his rescript, "and a reduction of excessive armaments which weigh upon all nations, present themselves in the existing conditions of the world, as the ideals toward which the endeavors of all governments should be directed."

The Greek idea of arbitration for the settlement of differences between Greek cities or states was passed on as a heritage to the medieval and even to modern times, transformed and enlarged only so far as to embrace all the Christian nations, whose numbers and power and religious faith compelled a wider application of the principle. No more among the western nations was the notion of arbitration conceived in the principles of humanity and abstract justice than it was among the petty republics of ancient Greece.

Herein lies the chief triumph of the first peace conference, and the peculiar honor of President Roosevelt in initiating and of the Emperor of Russia in issuing the call of the second Hague conference, that all the cultured nations, without regard to country, race or religious faith, are formally admitted as members of the world federation, each having full rights of open and free access to the supreme international tribunal, for purposes of complaint and defense. The direct and indirect consequences of this formal and actual recognition and establishment of the principle of equality, on the future relations of nations and of justice, as the actual guide and the final criterion of their conduct toward one another, are immeasurable—whether considered as an influence making for peace or as a source of large and more liberal ideas and principles of enlightenment, fraternity, of humanity.

The first Hague conference marked the opening of a new epoch in international arbitration. It marked the transition from the period immemorial, during which the preparations for wars and the settlements which followed wars, were the principal objects of diplomatic negotiations, to the new era when the paramount object will be the avoidance of wars and the preservation of peace. The opening era has been marked by four historic events of prime importance—the creation of the first Hague tribunal in 1902; the establishment of the peace of Portsmouth in 1905; and of the peace of Central America and the peace of Cuba, both in 1906. The way to restore peace through mediation, by the good offices of the nations, has been marked out. The one great practical problem remains—how to keep the peace.

If the paths of international peace lead through the open gateway of international arbitration, the problems to be solved in reaching the goal in view, are the most intensely practical, as they are the most fascinating problems of the statesmanship of the present and of the future. The visionary of yesterday is therefore the practical statesman of today. The foundation has been established by the Hague convention of July 29, 1899, for the pacific settlement of international disputes. The task remains to broaden the foundation and to build the superstructure. It is an intensely practical work, which time and experience will undoubtedly complete, as nearly as institutions, merely human, can be brought to perfection.

ARBITRATION AMONG THE GREEKS

The idea, imperfect though it was, of the arbitration of differences between states, appears to have been familiar to the Greeks as far back as 600 years before Christ. Plutarch relates, in the life of Solon, that a long controversy having raged between the Athenians and Megarensians over the possession of the isle of Salamis, they finally referred the decision of the question to the Lacedæmonians; and the matter was determined by five Spartans, the names of whose members, given by Plutarch, are perhaps those of the first arbitration tribunal of whom any authentic record is preserved. Their names ought to be inscribed along with those of Gentilis and Grotius, on the new temple of peace at the Hague.

According to Plutarch's account, Solon appeared, as he would be styled today, as the agent and counsel for the Athenians before the tribunal. He appears to have made an ingenious plea, more specious perhaps than truthful, in behalf of the Athenians. Whether he won or lost his case Plutarch does not say, but we may infer that he was successful, since the historian informs us that Solon acquired considerable honor and authority by this affair.

Before the outbreak of the Peloponnesian war, in 431 B.C., Archidamus, their king, in addressing the Lacedæmonians, on the complaints made by the Potidæans, the Corinthians and other Greek states against Athens, and on the representations thereupon made by the latter said:

These practices, then, which our fathers bequeathed to us and which we have always retained with advantage, let us not give up; nor determine hurriedly, in the short space of a day, about many lives and riches and states and honors; but let us do it calmly and send to the Athenians respecting Potidæa, and send respecting those things in which the allies say they are injured; especially as they are ready to submit to judicial decision; and against the party which offers that it is not right to proceed as against a guilty one. (Thucydides: *The Peloponnesian War*, Book I, §85.)

In the masterly letter written by Philip, King of Macedon, to the Athenians, presenting his grievances against them, he said:

"I proposed to bring our differences to a judicial determination. * * * This I frequently desired; you would not listen to it." Continuing, he said: "All this could not prevail on me to make any attempt on your city, or your navy, or your territories, although I might have had success

in most or even all of them. I chose rather to continue my solicitations to have our complaints submitted to proper umpires, and which, think you, is the fittest decision—that of reason or that of the sword? Who are to be judges in your cause—yourselves or others?” (Leland’s *Translations of Orations of Demosthenes*.)

This inquiry goes to the marrow of the paramount international questions of today—shall arbitration prevail; and shall it be impartial?

Philip understood the question. Not less wary and skillful as a politician than as a soldier, he took care to get a representation for Macedon in the Amphictyonic Council.

There were many Greek associations styled by the name; but the one that met at the temple of Apollo at Delphi, in the spring of the year, and at the temple of Demeter at Thermopylæ in the autumn, was known par excellence as the Amphictyonic Council. Twelve Greek states, each having two votes, were represented in this council. Some changes took place in the council, one of them being the admission of the Macedonians in place of the Phocidians. The idea of fraternal solidarity, rooted, however, rather in community of blood, language and religion, than in political interest, always obtained among the Greeks. But the Amphictyonic Council was in no sense a national congress, charged with control or legislation of an imperial or federal character. Each state was politically independent; and the council acted not for the direction of the general affairs of Hellas but rather to restrain aggressions of one member of the council upon another, and as a conservator of religion and of Grecian honors. They sometimes acted, however, as a kind of supreme tribunal of peace, of conciliation and arbitration among Hellenic states; and sometimes they were manipulated to subserve the interests of the more powerful states. (Dury: *Histoire des Grecs*, tome 1, p. 726–32; Smith’s *History of Greece*, pp. 49, 50, 513.)

According to Merignhac, the Greeks had frequent recourse to arbitration, but only among themselves. Their arbitrations did not bear upon important political questions, but only on differences with respect to religion, commerce, boundaries and the possession of disputed territory. An arbitration was had between Athens and Megara over the possession of the island of Salamis, mentioned by Plutarch. The Etolians arbitrated a boundary dispute between the cities of Melitæa and Pera in Thessaly. Themistocles decided the controversy between

the Corinthians and Corcyrians over the possession of Leucas, a Greek colony.

Other instances are given of arbitrations of disputes between the Greek states. (Merignhac: *L'Arbitrage International*, §20.)

ARBITRATION UNDER THE ROMAN RULE; IN MEDIEVAL AND MODERN TIMES.

According to Merignhac, Rome

never consented to settle by arbitration her misunderstandings with other states. After the example of Greece, she saw in the stranger only an enemy. She aspired to universal domination and to this end subordinated her foreign policy. Moreover, the kingly people would have considered themselves degraded in submitting to the judgment of another power. * * * Her pretension to superiority, which was the negation of the idea of arbitration, was completely realized when she became mistress of the world. * * * At first the senate, and afterwards the emperor, as absolute arbiters, gave audience to the representatives of peoples who made complaints and demanded justice. They were thus the natural judges of disputes which arose between the subject peoples. The practice of taking the senate for arbiter was even adopted by independent nations fascinated with the prestige of the Roman name. The Romans do not appear, however, to have exercised the rôle of arbiter with great good faith, sometimes settling the question by themselves, taking possession of the territory in dispute. (Merignhac: *L'Arbitrage International*, §24.)

According to Merignhac, arbitration was in vogue in the Middle Ages, as in later and modern times. The nations had a common tie of religious faith, and the bishops of Rome exercised judgment, sometimes invited and sometimes uninvited, in quarrels between peoples and kings. This was one of the great offices performed by the papacy for humanity. Archbishops, bishops, popes, sovereigns, parliaments and cities were in turn chosen as arbitrators in numerous cases. Arbitral commissions were sometimes appointed, consisting of eminent jurisconsults.

Under the influence of religious and feudal ideas arbitrations were very frequent in the Middle Ages. * * * Especially in Italy, where no less than one hundred occurred between the princes and communes in the twelfth century. * * * But as absolute monarchies gradually became established in Europe, arbitrations became more rare. They diminished in numbers during the fourteenth and fifteenth centuries, and from the end of the sixteenth century to the French Revolution, they had almost disappeared from international practice. (Merignhac: §§31-43.)

OF ARBITRAL AGREEMENTS AND SANCTIONS

In former as well as in recent times, the arbitration of differences between states was usually arranged by means of special and transitory agreements. There were, however, some examples of general treaties of a permanent character containing stipulations for arbitration of differences which might arise between the contracting parties

According to authorities cited by Merignhac:

A treaty of alliance between Argos and Lacedæmon contained a final clause providing that if any misunderstanding arose between the two allied cities, they might take for an arbiter another city, whom they might judge to be impartial. A convention between the cities of Hyerapytria and Priansos stipulated that with respect to injuries already suffered by one from the other, Enipan and Meon, the Kosmoi, that is to say, chief magistrates, of cities in Crete, should with their colleagues terminate the differences on the subject, before such tribunal as the two cities should please. With respect to future injuries, advocates should be employed according to the method described in the public edict. The Kosmoi were likewise to designate the city from which the two parties were to choose the arbitrators. (Merignhac: §23.)

This stipulation, styled the compromissorial or arbitral clause, providing for permanent arbitration, was not of frequent use in the Middle Ages or modern times.

It was of frequent use between the commercial cities of Italy. The Swiss, in their treaties of alliance, either among themselves or with other peoples, had recourse to it. In a treaty of alliance concluded in 1235 between Genoa and Venice, was an article which read: "If there should arise between said cities a difference which cannot be easily adjusted by them, it will be solved by the arbitration of the sovereign pontiff; and if one of the contracting parties act in contravention of the treaty, we consent that his Holiness excommunicate the offending city." The treaty signed in 1516 between Francis I. and the Swiss Cantons—the treaty known as the "perpetual peace"—contained the following clause: that the difficulties and disputes which may arise between the subjects of the king and the inhabitants of the Swiss Cantons shall be determined by the judgment of four good men, two to be named by each party. These four arbitrators shall hear, in a designated place, the parties or their counsel; and if they disagree in opinion, the complaining party may select in the neighboring lands, a sage and upright man, above suspicion, who shall unite with the arbitrators in order to decide the difficulty. If the dispute be between a subject of the cantons and leagues and the king of France, the cantons shall examine the complaint, and if they find it well founded, they shall bring it before the king, but if the king should not be convinced, the complaining parties can invoke the king before arbitrators who shall be chosen from among the judges

of Coire and of Valais, above suspicion to the parties; and what shall then be concluded and done by the said judges, either by judicial sentence or by amicable arrangement, shall be final and inviolably observed and irrevocable. (Merignhac: §42.)

Merignhac says that this treaty has been the basis of numerous subsequent alliances between France and the Swiss cantons.

In the last century, and more particularly during the latter half of the century, there has been a marked trend of international sentiment and practice toward the making of agreements for permanent arbitration, either by treaties concluded solely with that view, or by the inclusion of an arbitral clause in treaties of a general nature. The number of such permanent arbitration treaties now subsisting is nearly fifty.

It is now nearly sixty years since the United States first entered into a permanent treaty engagement (with Mexico) for arbitration, obligatory, unless deemed by either party "altogether incompatible with the nature of the difference or the circumstances of the case." The recent treaty for arbitration of pecuniary claims between all the American states, and the negotiation of permanent arbitration treaties among European and American states, show the powerful impetus of public sentiment in favor of arbitration.

The manner in which the question of penalties and sanctions was anciently dealt with has already been suggested; as in the instance given of authorized excommunication of the recalcitrant party. Sometimes a fine was authorized, as in the treaty of August 9, 1475, between Louis XI. and Edward IV., in which the penalty of 3,000,000 francs was named. (Merignhac: §41.)

Sometimes the parties gave bail or security for the performance of the award to be rendered.

After all is said with respect to securities, penalties and federal, or other, execution and enforcement of the awards of international tribunals, the final sanction of international law and arbitration is found in the common international juridical conscience—at bottom the same sanction as that for the rules of private morality which generally govern men in their jural and extra-jural conduct and relations. The essence of law is order; and of human law, order founded in justice. Any system of rules which produces order is law. The sanction, explicit or implicit, may influence in greater or less degree

the observance of the law, the observance of order in the conduct of individuals and of states. All rules of order have their sanction—in nature, in ethics, in statutes, in treaties, in usage and custom. The diversity in the kind and coercive force of sanctions does not alter the essential nature of law of which the criterion is order, the basis justice.

Confusion has arisen out of a too narrow conception and restriction of the meaning of the term sanction, which includes all the forces, influences, agencies and instrumentalities, of a legal and moral nature, whereby obedience to law and its judgments is enforced.

In this view, little thought need be given to the theoretical consideration of the question of the sanctions of international law and of arbitral sentences. The rule is—and the exceptions are so rare that they serve conclusively to prove the rule—that states who have voluntarily submitted to international arbitration, do voluntarily observe and execute the award rendered by the tribunal of their own choosing. The execution of all judicial decrees rests at last upon the public conscience and sentiment which makes the laws, and the condition of which the world over is a sufficient guaranty for the performance of awards solemnly rendered by tribunals created by arbitrating states.

The rising power of public opinion, together with the enlightened appreciation of selfish interest and security, explains the increasing disposition of governments to resort to arbitration and to execute the award. In the words of Baron D'Estournelle de Constant,

It is increasingly difficult for a government, even monarchic and aristocratic, to put itself in opposition to public opinion,

which, it may be added, is growing in all countries more intense and forceful and more perilous seriously to affront.

Witness Russia, the internal effects of an unpopular war will perhaps be more grave than the external consequences. * * * Herein is the sanction of arbitration. (*Les Sanctions de L'Arbitrage International*, par Jacques Dumas, preface, pp. xii and xiii.)

Experience has shown the sufficiency of this guaranty in general to insure the voluntary performance of the awards of arbitral tribunals.

It will constitute a part of the triumph of reason over brute force that no place be given to the use of violence in enforcing the execution of the arbitral sentence; that the state that fails to do so thereby vol-

untarily puts itself outside the pale of international law. And if a graver sanction were needed, provision might well be made for the creation of a supreme tribunal to be composed of arbitrators chosen from civilized states disinterested in the original controversy, authorized and empowered to hear and pass on the question whether an arbitrating state had refused to abide by an arbitration to which it had voluntarily submitted; and whether there were just and lawful reasons for its contumacy; and if not, to pass the sentence of contumacy and outlawry, with the legal consequence of non-intercourse with and political recognition by other civilized states during the delinquency. The condemnation and the adjudged penalty that clearance papers should not be issued by the latter to the ports of the former and the suspension of diplomatic relations, during the delinquency, would have all the effects of a blockade without bloodshed and without the use of force. The coercion would not be less effective because pacific. What government could justify itself before its own people and before the world and withstand the judgment of condemnation?

WILLIAM L. PENFIELD.

Washington, D. C.